

The Special Administrative Law Judge awarded claimant permanent partial disability benefits based upon a 59 percent work disability. The respondent and Workers Compensation Fund requested this review and ask the Appeals Board to review the issues of: (1) Whether claimant's accidental injury arose out of and in the course of his employment with the respondent; and (2) The nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds:

For the reason expressed below, the Award should be modified.

Claimant alleges injuries to both upper extremities from February 1992 and each and every working day thereafter through May 11, 1993. Claimant also contends he is entitled an award based upon work disability.

Claimant began working for respondent in 1987 as an aircraft modification mechanic and subassembler. In approximately 1992, claimant began developing symptoms of bilateral carpal tunnel syndrome. After reporting his symptoms, respondent's medical department referred claimant for treatment to Wichita orthopedic surgeon and hand specialist James L. Gluck, M.D.

Dr. Gluck first saw claimant on April 15, 1992 and diagnosed bilateral carpal tunnel syndrome. After a period of conservative treatment, Dr. Gluck performed left carpal tunnel release in May 1992 and right carpal tunnel release in July 1992. After recuperating from surgery, claimant returned to work for respondent in September of 1992 with the following restrictions: Limit carrying to 50 pounds occasionally and 20-30 pounds frequently; limit overhead lifting to 30 pounds occasionally and 15 pounds frequently; use an impact glove whenever using vibratory tools; and limit riveting to no more than 30 minutes at a time with 15-20 minutes of non-vibratory tool activity in between. Dr. Gluck formulated these restrictions based upon a functional capacity evaluation performed in conjunction with a work hardening program. In October 1992, Dr. Gluck made the restrictions permanent and assigned claimant a 6 percent whole body functional impairment rating for the bilateral upper extremity injuries.

Although claimant obtained good results from the surgery and was nearly symptom free when he returned to work in September 1992, claimant experienced a recurrence of symptoms and returned to Dr. Gluck in February 1993 for additional treatment. Claimant continued to work for respondent until he was laid off on May 11, 1993.

Since his layoff, claimant has obtained employment with a temporary job placement agency driving a fork lift at Rubbermaid's distribution center in Goddard, Kansas. At the time of regular hearing, claimant had been working for the placement agency for three weeks earning approximately \$5.75 per hour and was working an average of 41 hours per week. He was not receiving fringe benefits. Claimant testified he believed his pay would increase to \$7.75 per hour if Rubbermaid would hire him as a permanent employee and retain him for a year.

(1) The Appeals Board finds claimant has sustained personal injury by accident arising out of and in the course of his employment with respondent that resulted in bilateral carpal tunnel syndrome. This finding is based upon claimant's testimony that his job consisted

primarily of repetitive drilling and reaming, shooting and bucking rivets and installing fasteners. The job required repetitive use of the hands and frequent use of pneumatic powered hand tools. Also, claimant's treating physician, Dr. Gluck, testified he believes claimant's injuries were caused by his work activities at respondent's plant.

Because claimant had fully developed bilateral carpal tunnel syndrome when he first saw Dr. Gluck on April 15, 1992, the Special Administrative Law Judge used that date for the date of accident in this proceeding. The parties did not object to that finding in their oral arguments nor otherwise raise that as an issue for the Appeals Board to decide. Therefore, the date of accident is not an issue on this review and the finding of the Special Administrative Law Judge will be adopted by the Appeals Board along with the Judge's findings regarding the average weekly wage for that date.

(2) The Appeals Board agrees with the Special Administrative Law Judge that after surgery claimant did not retain the ability to return to his regular job duties of drilling, reaming and riveting. This finding is supported by the evidence that claimant returned to his regular work in September 1992 and experienced increased symptoms which continued to worsen until he was laid off. Claimant testified that his symptoms progressively worsened after returning to work because he was required to perform the same type of work he was doing when his problems initially developed. Also, Dr. Gluck saw claimant in February 1993 and Dr. Anthony Pollock saw claimant in March 1993 for increased symptomatology. Both doctors testified that claimant could not continue to do the work he was performing for the respondent because of his bilateral upper extremity injuries.

Because his is an "unscheduled" injury, claimant's right to permanent partial disability benefits is governed by K.S.A. 1991 Supp. 44-510e. That statute provides:

"The extent of permanent partial disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Based upon the evidence presented, the Appeals Board finds that respondent is entitled to the presumption of no work disability from September 16, 1992 through May 11, 1993, the period claimant returned to work at a comparable wage after recuperating from his surgeries. Permanent partial disability benefits for that period should be based upon the average weekly wage of \$748.70 as determined by the Special Administrative Law Judge and claimant's functional impairment rating of 6 percent as determined by both Dr. Gluck and Dr. Pollock. The Appeals Board is mindful of Dr. Kenneth Zimmerman's testimony that claimant's whole body functional impairment rating is 10 percent, but the Appeals Board finds the opinions of Dr. Gluck and Dr. Pollock persuasive.

For the period commencing May 12, 1993, the Appeals Board finds that the evidence overcomes the presumption of no work disability. Once the respondent terminated claimant's employment and failed to provide or offer accommodated

employment paying a comparable wage, the presumption of no work disability is overcome and claimant became entitled to permanent partial disability benefits based upon the higher of work disability or functional impairment. See Lee v. Boeing Co. - Wichita, 21 Kan. App. 2d 365, 899 P.2d 516 (1995). As the court stated in Lee, the presumption of no work disability was designed to prevent a worker from "double dipping." However, it was not the intent of the legislature to deprive an employee of work disability benefits when the employer neither provides nor offers employment paying a comparable wage.

As indicated above, according to Dr. Gluck, claimant can carry 50 pounds occasionally and 20-30 pounds frequently. He can do overhead lifting of 30 pounds occasionally and 15 pounds frequently. He can use vibratory tools if he uses an impact glove; however, he should limit riveting to less than 30 minutes at a time with 15-20 minutes of nonvibratory tool work in between. Likewise, Dr. Pollock believes claimant should not use any vibratory tools or do any frequent pulling or pushing with his hands.

The only person to testify regarding loss of ability to perform work in the open labor market and the loss of ability to earn a comparable wage was human resources consultant Jerry D. Hardin. Mr. Hardin testified he believes claimant has lost 50-55 percent of his ability to perform work in the open labor market considering the restrictions of either Dr. Gluck or Dr. Pollock. He also testified he believes claimant retains the ability to earn approximately \$240.00 per week, which is consistent with claimant's actual earnings with Rubbermaid.

Based upon the above evidence, the Appeals Board finds claimant has sustained a 50-55 percent of his ability to perform work in the open labor market and an approximate 74 percent loss of ability to earn a comparable wage. The finding of loss of ability to earn a comparable is based upon a comparison of claimant's average weekly wage of \$939.99, the amount determined by the Special Administrative Law Judge for the period commencing with claimant's layoff, with the \$240.00 per week that Mr. Hardin indicates claimant is now able to earn.

Although the Appeals Board is not required to equally weigh the loss of ability to perform work in the open labor market with the loss of ability to earn a comparable wage, there appears no compelling reason to give one factor greater weight than the other. Therefore, the Appeals Board finds that the losses should be averaged which yields an approximate 63 percent work disability which the Appeals Board considers to be an appropriate basis for the award in this case.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated July 8, 1994, should be, and hereby is, modified to award claimant permanent partial disability benefits based upon his 6 percent whole body functional impairment and an average weekly wage of \$748.70 for the period preceding May 12, 1993, and permanent partial general disability benefits based upon a 63 percent work disability and an average weekly wage of \$939.99 for the period commencing May 12, 1993, until either the award is paid out or further order of the Director.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated July 8, 1994 should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Ronald D. Lundry, and against the respondent, The Boeing Co. - Wichita, and its insurance carrier, Aetna Casualty & Surety, and the Kansas Workers Compensation Fund, for an accidental injury which occurred April 15, 1992 and based upon an average weekly wage of \$748.70 for 18 weeks of temporary total disability compensation at the rate of \$289.00 per week or \$5,202.00, followed by 37.86 weeks at the rate of \$29.95 per week or \$1,133.91 for a 6% permanent partial general disability, followed by 324.10 weeks based upon an average weekly wage of \$939.99 at the rate of \$289.00 per week or \$93,664.09 for a 63% permanent partial general disability for a total award of \$100,000.00.

As of February 29, 1996, there is due and owing claimant 18 weeks of temporary total disability compensation at the rate of \$289.00 per week or \$5,202.00, plus 37.86 weeks of permanent partial disability compensation at the rate of \$29.95 per week in the sum of \$1,133.91 plus 146.43 weeks of permanent partial disability compensation at the rate of \$289 per week in the sum \$42,318.27 for a total due and owing of \$48,654.18 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of the \$100,000.00 shall be paid at \$289.00 per week until fully paid or until further order of the Director.

Pursuant to stipulation, the Workers Compensation Fund is ordered to pay 50 percent of the compensation, medical expense, and costs associated with this award.

The Appeals Board adopts the orders of the Special Administrative Law Judge that are not inconsistent with the findings or orders set forth above.

IT IS SO ORDERED.

Dated this ____ day of February 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gary K. Jones, Wichita, KS
Frederick L. Haag, Wichita, KS
Michael D. Streit, Wichita, KS
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director

